In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-13

ANTONIO SEGURA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals issued no opinion. The opinion of the district court denying petitioner's motion to suppress (R. 5) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1972 (Pet. App. A-1-A-3). A petition for rehearing was denied on June 2, 1972 (Pet. App. A-4-A-7). The petition for a writ of certiorari was filed on July 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, at the time of trial, the government possessed undisclosed information that a government witness testified falsely.

2. Whether petitioner voluntarily consented to the search of his apartment.

3. Whether the trial court erred in admitting evidence of petitioner's attempted escape from jail, and in failing, *sua sponte*, to instruct the jury that consciousness of guilt does not always reflect actual guilt.

4. Whether the trial court's comments about heroin deprived petitioner of a fair trial.

5. Whether the use of petitioner's alias in the indictment and the government's evidence at trial was improper.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner[1] was convicted of having received, concealed and facilitated the transportation of a quantity of heroin knowing that the heroin had been illegally imported, in violation of 21 U.S.C. (1964 ed.) 174, and of having conspired to violate 21 U.S.C. (1964 ed.) 174. Petitioner was sentenced to imprisonment for concurrent terms of eighteen years and fined $40,000. The court of appeals affirmed without opinion (Pet. App. A-1-A-3).

[1] Indicted with petitioner in count one were six French nationals, including one Edmond Taillet, the chief prosecution witness. The cases against all the French nationals except Taillet were severed.

The evidence at trial, which is not in issue, showed a large scale, complex conspiracy, involving bringing a car from Spain to Mexico and thence to New York where it arrived in April 1971 with 93.5 kilograms of pure heroin concealed in it. Petitioner met in New York with co-conspirator Taillet, received the heroin, paid $377,550 for it, and agreed to pay more later. Taillet was arrested before he received the rest of the money. Petitioner was arrested about two weeks later.

ARGUMENT

1. Petitioner asserts that the government at trial concealed evidence that a government witness testified falsely. On cross-examination Taillet, who had admitted several trips to the United States prior to April 1971, stated that his only dealing in drugs was the April 1971 transaction on trial (Tr. 247).[2] When recalled by petitioner for further examination, Taillet was asked about prior trips to New York and dealings he had on behalf of a certain Frenchman (Riccard), with a man named Tonio in New York (Tr. 716–728). He said that Riccard paid his expenses (Tr. 728) and that Tonio wanted to entrust him with money to bring back to France (Tr. 726). In closing argument, petitioner's counsel challenged Taillet's credibility, saying that Taillet had been coming to New York and dealing in drugs with Tonio (Tr. 765, 780).

[2] "Tr.", "S. Tr." and "II Tr." refer, respectively, to the transcript of the trial, pretrial suppression hearing and sentencing hearing, copies of which have been lodged with the Clerk of this Court. "R." refers to the record on appeal, which is also on file with the Clerk of this Court.

At the sentencing hearing several weeks after trial the prosecutor stated: "[t]he evidence in this case shows that Mr. Goldberger [petitioner's counsel] and Mr. Segura knew very well about Mr. Taillet's prior trips to New York and prior associations with another person by the name of Antonio [sic], and I submit that this is because Mr. Taillet was in New York on other narcotics transactions and they involved either Mr. Segura or one of his associates" (II Tr. 14). Relying on this statement at sentencing, petitioner claims that the government improperly failed to make clear at trial that Taillet's denial of prior narcotics transactions was false. As the United States Attorney represented below, the government was ignorant of Tonio's identity at the time of trial. It learned for the first time after the trial in this case that he was one Antonio Flores, a close associate of petitioner's and a fugitive on another narcotics charge. Thus, the government did not possess any undisclosed information at the time of trial indicating that Taillet had lied. In any event, evidence concerning Taillet's prior dealings in narcotics would have been collateral at best. Defense counsel argued such dealings to the jury, and the government's summation did not contest this argument. The prosecutor's remarks at sentence were supported by the trial record, and not inconsistent with his position and knowledge during the trial.

2. Petitioner challenges (Pet. 37–38) the trial court's ruling, after an evidentiary hearing on petitioner's motion to suppress, that both petitioner and his wife had freely and unequivocally consented to the

search of their apartment (R. 5). The evidence showed that following his arrest on June 14, 1971, petitioner was searched, advised of his rights, and taken to the office of the United States Attorney where he was again advised of his rights (S. Tr. 53–54, 56–58, 109–110, 116–117, 120). The Assistant United States Attorney (Maloney) asked petitioner for permission to search his apartment and explained to petitioner his Fourth Amendment right to refuse permission to search; petitioner was further told that if he withheld permission an application for a search warrant would be made to a U.S. Magistrate, who could either grant or deny the application (S. Tr. 63, 84–85, 112). Petitioner, who appeared to be calm, agreed to the search of the apartment (S. Tr. 63, 112–113, 122, 125). Maloney then telephoned petitioner's wife at the apartment, and informed her of petitioner's arrest and his consent to the search of the apartment;[3] petitioner's wife indicated that she understood and said she had no objection (S. Tr. 128–130). Petitioner then conversed with his wife in Spanish for several minutes after which his wife told Maloney that it was all right to conduct the search (S. Tr. 64–65, 88–89, 128–130). Thereafter the agents searched the apartment and seized certain evidence (S. Tr. 60, 65–66, 71, 78, 113, 120).

[3] Present at the apartment at this time were petitioner's wife, his mother and four or five customs agents who had not yet commenced any search of the apartment (S. Tr. 22, 128, 131, 134, 135).

Although petitioner contends that his consent was given because he feared for the health of his pregnant wife who had told him she thought the agents were going to "tear" the apartment apart,[4] this contention was considered and rejected by the trial judge who heard testimony from petitioner and three of the customs agents. For reasons not set forth in the record, petitioner did not call his wife as a witness to substantiate his claims. In these circumstances the trial court did not err in finding that consent was freely and voluntarily given by petitioner and his wife. See *Bumper* v. *North Carolina,* 391 U.S. 543, 548–549; *United States* v. *Callahan,* 439 F. 2d 852, 861 (C.A. 2), certiorari denied, 404 U.S. 826.

3. Petitioner urges error in the admission of evidence of an unsuccessful escape attempt. Testimony was introduced at the trial that six days prior to the commencement of his trial, petitioner tried to escape from jail by cutting through some bars with a hacksaw and climbing into a nearby elevator shaft, leaving a dummy in his bed (Tr. 651–659). This evidence of the attempted escape was properly admitted to show a consciousness of guilt. See *United States* v. *Crisp,* 435 F. 2d 354, 359 (C.A. 7) (and cases cited therein), certiorari denied, 402 U.S. 947.

Petitioner now claims that the court erred in not *sua sponte* instructing the jury that "flight and feelings of remorse do not necessarily reflect actual guilt"

[4] One of the agents at petitioner's apartment testified that petitioner's wife was "composed" in the presence of the agents and appeared "relatively at ease other than the natural concern to the fact that her husband was arrested" (S. Tr. 133).

(Pet. 15). In closing argument petitioner's counsel, noting that petitioner had been in jail for five months, had argued that a man who had done nothing wrong would do anything to escape from jail (Tr. 761). The trial court's charge,[5] given without objection and not challenged in the court below, was a correct statement of the legal principle involved and was sufficiently protective of petitioner's rights. See *Bailey* v. *United States*, 410 F. 2d 1209, 1217 (C.A. 10), certiorari denied *sub nom. Freeman* v. *United States*, 396 U.S. 933. Since no specific instruction was requested by petitioner, the failure of the trial court *sua sponte* to give the form of instruction now sought by petitioner was not plain error.[6] *United States* v. *Solomon*, 422 F. 2d 1110, 1114 (C.A. 7), certiorari denied *sub nom. Sommar* v. *United States*, 399 U.S. 911; see also *United States* v. *Stevenson*, 424 F. 2d 923, 927 (C.A. D.C.).

[5] "* * * [T]his kind of conduct after the crime has been committed does not create a presumption of guilt. It is, however, a circumstance which may tend to prove consciousness of guilt and should be considered and weighed by you in connection with all the other evidence in the case.

"The weight to be given to the evidence we are talking about—namely, being found, and the dummy being put in the bunks, and so forth—depends upon the motives which prompted it, and all of the surrounding facts and circumstances, and so you will have to make a judgment on that. Consider all the facts and circumstances and then come up with your own decision on that particular aspect" (Tr. 824–825).

[6] *Miller* v. *United States*, 320 F. 2d 767 (C.A. D.C.), relied upon by petitioner, is not to the contrary since Judge Bazelon there stated that, if requested, the court should give an instruction to the effect that consciousness of guilt does not "necessarily reflect actual guilt." 320 F. 2d at 773 (opinion of Chief Judge Bazelon). Here, no such instruction was requested.

4. Petitioner protests certain remarks of the trial judge, who stated, without objection, during his instructions to the jury: "We know that in this case, which concerns a horrible drug which I have described many times as a leprosy of the will power * * *." (Tr. 804–805). Later in the charge the trial court briefly reviewed the history of heroin use and the enactment of the laws "against" heroin (Tr. 806–807). Such remarks did not deprive petitioner of a fair trial. Petitioner did not deny that this case involved a "major conspiracy to import drugs" into the country, but rather contended that he was not involved (Tr. 748). The trial court carefully instructed the jury as to the presumption of innocence, burden of proof and standard of reasonable doubt (Tr. 807–808, 843–845). Prior to the closing arguments, the judge told the jury that he had "no opinion" in the case (Tr. 745). During the charge he instructed the jury that they were the sole judges of the facts, that the court's comments on the facts were not binding on the jury, and that nothing said by the court was to be considered as evidence (Tr. 805–806, 814). The judge's remarks were not prejudicial to the petitioner.

5. Finally, petitioner claims that use of his alias in the indictment and at trial was prejudicial error. At trial, two automobile salemen identified petitioner and testified that using the name "Wilfredo Valentin," he had purchased two new cars for approximately $7,000 in cash during April and May, 1971 (Tr. 424–438). Documents relating to the sale of the automobiles and

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naming the purchaser as "Wilfredo Valentin" were also introduced into evidence (Tr. 425–428, 434–435). The evidence concerning use of the alias was proper here to show consciousness of guilt and participation in a transaction where it was desirable to conceal one's identity. See *United States* v. *Sutton*, 446 F. 2d 916, 922 (C.A. 9), certiorari denied, 404 U.S. 1025; *United States* v. *Wilkerson*, 456 F. 2d 57, 59 (C.A. 6), certiorari denied, June 26, 1972 (No. 71–6505 October Term, 1971). Since the evidence showed petitioner did in fact use the alias, inclusion of it in the indictment was not prejudicial. *United States* v. *Miller*, 381 F. 2d 529, 536 (C.A. 2), certiorari denied, 392 U.S. 929.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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